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06 UNITED STATES DISTRICT COURT  
07 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

08 ANTHONY E. LEWIS, ) CASE NO.: C08-1239-RSL  
09 )  
Petitioner, )  
10 )  
v. ) REPORT AND RECOMMENDATION  
11 )  
JEFFREY UTTECHT, )  
12 )  
Respondent. )  
\_\_\_\_\_ )

13  
14 INTRODUCTION

15 Petitioner has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254.  
16 Respondent has filed a motion to dismiss, raising the statute of limitations as a bar to the Court's  
17 consideration of the petition. Petitioner has filed a response to respondent's motion. Having  
18 reviewed the parties' submissions and the balance of the record, the Court concludes, as set forth  
19 below, that the petition should be dismissed as untimely pursuant to 28 U.S.C. § 2244(d).

20 BACKGROUND

21 Petitioner was convicted in 1991, after pleading guilty to several criminal charges in King  
22 County Superior Court. (Dkt. No. 9, Ex. 1, 2, 3). His attorney filed an appeal almost a year later

01 in the Washington Court of Appeals. (*Id.*, Ex. 7). The Court of Appeals dismissed the appeal on  
02 July 26, 1993, after denying petitioner's motion to enlarge time. (*Id.*, Ex. 5). Petitioner finished  
03 serving the sentence imposed pursuant to his 1991 convictions and was released in 1997. (*Id.*, Ex.  
04 4). Petitioner is currently incarcerated again, but his present confinement is due to a 2007  
05 conviction. (*Id.*). In 2008, petitioner filed a personal restraint petition ("PRP") challenging the  
06 1991 conviction. (*Id.*, Ex. 9). The PRP was dismissed on October 7, 2008. (*Id.*)

07 On August 26, 2008, petitioner filed a federal habeas petition under 28 U.S.C. § 2254.  
08 (Dkt. No. 4). Respondent filed the instant motion to dismiss on October 13, 2008. (Dkt. No. 9).  
09 Petitioner filed a response to the motion on October 27, 2008; respondent has not filed a reply,  
10 and the matter is now ready for review.

#### 11 GROUND FOR RELIEF

12 In his § 2254 petition, petitioner raises the following two grounds for relief:

- 13 1. Ineffective Assistance of Counsel of [sic] Attorney's failure to timely file a notice  
14 of appeal.
- 15 2. Due Process Violation under the Fourteenth Amendment.

16 (Dkt. No. 4 at 6, 7).

#### 17 DISCUSSION

18 Respondent's motion to dismiss is based upon his argument that petitioner's habeas  
19 petition is untimely under the one-year statute of limitations provided in the Antiterrorism and  
20 Effective Death Penalty Act of 1996. *See* 28 U.S. § 2244. While this argument appears logical,  
21 as petitioner waited approximately fifteen years after his convictions were final to file the instant  
22 petition, the facts are a bit more complex than respondent suggests. In his response to the motion

01 to dismiss, petitioner argues that the sentence for his 2007 conviction was improperly enhanced  
02 by the prior 1991 convictions. (Dkt. No. 10 at 2). The 1991 convictions, petitioner maintains,  
03 are “constitutionally infirm” because his attorney failed to file a timely notice of appeal challenging  
04 the convictions.<sup>1</sup> (*Id.*) Thus, petitioner seeks to challenge his 2007 sentence through the instant  
05 habeas petition on the ground that the 1991 convictions, used to enhance the 2007 sentence, were  
06 unconstitutionally obtained.

07 The Supreme Court addressed precisely this situation in *Lackawanna County Dist.*  
08 *Attorney v. Coss*, 532 U.S. 394 (2001). In *Lackawanna*, the Court held that where, as here, prior  
09 expired convictions are used to enhance a state sentence, the expired convictions generally may  
10 *not* be challenged “through a petition under § 2254 on the ground that the prior conviction was  
11 unconstitutionally obtained.” *Id.* at 403-404. The only exception recognized by the Court to this  
12 rule is if the prior conviction was obtained without counsel having been appointed to represent the  
13 petitioner. Because petitioner was represented by counsel when he pleaded guilty to his 1991  
14 convictions, *Lackawanna's* “failure to appoint counsel” exception does not apply and petitioner  
15 is precluded from collaterally attacking those convictions through the instant habeas petition. *Id.*  
16 Accordingly, respondent’s motion to dismiss should be granted and the petition dismissed with  
17 prejudice.

## 18 CONCLUSION

19 For the foregoing reasons, petitioner’s habeas petition, and this action, should be dismissed  
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21 <sup>1</sup> Petitioner does not state how he was prejudiced by counsel’s alleged failure to file a  
22 timely notice of appeal. In other words, he does not set forth any grounds on which his 1991  
convictions could have been attacked in a direct appeal.

01 with prejudice. A proposed Order is attached.

02 DATED this 1st day of December, 2008.

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05 Mary Alice Theiler  
06 United States Magistrate Judge  
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